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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA WAYNE WEDDLES, Defendant and Appellant.	C057666 (Super. Ct. No. SF103902A)

APPEAL from a judgment of the Superior Court of Sacramento County, George J. Abdallah, Jr., Judge. Affirmed as modified.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Michael P. Farrell, Assistant Attorneys General, Stephen G. Herndon and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, IV and V of the DISCUSSION.

In this robbery case, we must answer the following question: "Am I my brother's keeper?" The answer is, "yes."

A jury convicted defendant Joshua Wayne Weddles of two counts of first degree residential robbery (Pen. Code, § 211 – counts 1 and 2),[1] first degree burglary (§ 459 – count 4), making a criminal threat (§ 422 – count 5), and assault with force likely to produce great bodily injury (§ 245, subd. (a)(1) – count 6). The jury also found defendant personally used a firearm as to both robbery counts. (§ 12022.53, subd. (b)).

Sentenced to an aggregate term of 27 years four months in state prison, defendant appeals, claiming: (1) insufficient evidence supports his conviction for robbery of Armando Navarette (Armando), (2) insufficient evidence supports his conviction of making a criminal threat, (3) the trial court erred by failing to give, sua sponte, a unanimity instruction as to the criminal threat count, and (4) the trial court committed multiple sentencing errors.

In the published portion of the opinion, we find that sufficient evidence supports defendant's convictions for the robbery of Armando, who was forced at gunpoint to turn over to the robbers some $1,500 that belonged to Armando's brother, Alex Navarette (Alex). In the unpublished portion of the opinion, we find that the trial court committed two sentencing errors. However, we find no other prejudicial error.[2] Accordingly, we

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[1] Undesignated statutory references are to the Penal Code.

[2] We conclude that the trial court erroneously failed to give a jury unanimity instruction but that the error is harmless.

affirm the convictions and remand the case for correction of the sentencing errors.

FACTUAL BACKGROUND

Paris Brown, testifying on behalf of the prosecution in hopes of receiving a lighter sentence for himself, explained that he happened to run into defendant at a liquor store in Stockton, California on the evening of January 19, 2007. The two men decided to get some marijuana to share. A third person – whom they knew as a crack cocaine addict but not by name – came along. They walked several blocks to an apartment on North Commerce Street, where Brown had previously purchased marijuana.

When the men arrived at the apartment around 11:30 p.m., Alex was inside with his girlfriend, Savannah Mowry (Savannah), their two-year-old son, and Alex's brother, Armando. Savannah and her son were asleep on a loveseat while Armando was asleep on another couch.

Alex heard a soft knock on the door. Not expecting anyone at that hour, Alex partially opened the door and saw defendant pointing a gun at his face. Alex attempted to grab the gun, but defendant warned him, "Don't fight, . . . you're playing with a loaded gun." Defendant, Brown, and the third man forced their way into the apartment, knocking Alex to the ground.

As defendant subdued Alex and held the gun to his head, Brown and the other individual ran toward Armando on the couch and started punching him, yelling, "'Where's the money, where's the money . . . . We'll shoot you, we'll pop you.'" Armando was then taken to the bedroom by Brown and the other assailant.

After showing them a container where Alex and Savannah's money was kept, Armando was taken back into the living room.

Defendant and one of his confederates then took Alex into the back bedroom. When Alex came out of the room, his lip was bleeding, having been hit in the mouth with a fist and struck on the head with a hard object.

The three assailants fled the apartment with $1,500 in cash, two Ziploc bags containing marijuana, and several small items – including Armando's car keys. Before they departed, defendant told Alex: "I better not see this shit in the newspaper, don't call the police. We do this shit bare-faced. I'm [something unintelligible] bandit."

After the incident, Alex, Savannah, and Armando were "just kind of shaken and scared at the same time." Out of fear, they moved because they "didn't feel safe in the neighborhood any longer."

DISCUSSION

I

Sufficiency of the Evidence - Robbery of Armando

Defendant contends the evidence was insufficient to prove that Armando was a victim of robbery. Defendant argues that Armando had no interest in or possession of the $1,500 that Alex kept hidden in his bedroom. We reject the argument.

A. Standard of Review

In assessing claims of insufficient evidence "'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is,

evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320, 61 L.Ed.2d 560.)" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

B. Evidence Presented at Trial

Immediately after entering the apartment, two of the assailants rushed at Armando. Armando scuffled with the assailants until defendant ordered him to stop. Defendant threatened to shoot Alex in the head if Armando continued to resist.

The assailants demanded to know where the money was kept. Armando testified that the assailants "just kept repeating, 'Where's the money . . . . where's the money?'" and, "'We'll shoot you, we'll pop you.'" While defendant held a gun to Alex's head, Alex instructed Armando to show the assailants where the money was kept in the bedroom. Armando already knew that Alex kept his money in a decorative jar in the bedroom. He testified, "I knew where my brother was holding the money 'cause I knew – because I knew where he was saving his money at. And I knew what – you know, where he put it, and so my brother's, 'Man, like just give it to him, you know,' 'cause the baby was there."

Armando led two of the assailants to the bedroom, where he pointed out the jar. The robbers took $1,500 in cash from the

hiding place. The assailants then ransacked the apartment and left after taking a few small items.

C. Robbery

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

As we explained in *People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064-1065, "California follows 'the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken.' (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) '"Robbery" is an offense against the person[.]"' (*People v. Miller* (1977) 18 Cal.3d 873, 880.) Accordingly, a victim can be any person who shares 'some type of "special relationship" with the owner of the property sufficient to demonstrate that the victim had authority or responsibility to protect the stolen property on behalf of the owner.' (*People v. Scott* (2009) 45 Cal.4th 743, 753.) Persons with just such a special relationship include business employees and parents living with their adult children. (*Scott, supra*, 45 Cal.4th at pp. 752, 753-754; see *People v. Jones* (2000) 82 Cal.App.4th 485, 491.)"

Defendant does not dispute that property was taken from the apartment or that force and fear were employed against Armando. Instead, defendant argues for reversal of the conviction for robbery of Armando by arguing that "Armando had no possession of or interest in the money" belonging to Alex.

However, Armando had a special relationship with his brother that endowed Armando with constructive possession of his brother's cash. On this point, we find instructive the case of *People v. Gordon* (1982) 136 Cal.App.3d 519 (*Gordon*). *Gordon* involved robbers who entered the Lopes home, threatened them at gunpoint, and took a bag containing cash and marijuana from their adult son's room. (*Id.* at pp. 523-524.) "The only evidence in the record to support a finding of possession is the fact Mr. and Mrs. Lopes owned and lived in the residence." (*Id.* at p. 529.) Even though the evidence indicated the Lopeses had no prior knowledge of the stolen items, the convictions for robbery were affirmed. (*Ibid.*)

The *Gordon* court explained that persons responsible for protecting and preserving property are properly deemed to be robbery victims. Such persons have been held to include a purchasing agent, store clerks, a barmaid, janitors, watchmen, and gas station attendants. (*People v. Gordon*, *supra*, 136 Cal.App.3d at p. 529.) Reasoning that if such persons "were responsible for the protection and preservation of the property entrusted to them, parents have at least the same responsibility to protect goods belonging to their son who resides with them in their home." (*Ibid.*) Consequently, the parents were victims of robbery. (*Ibid.*)

As in *Gordon*, the robbery conviction in this case may be affirmed based on constructive possession of an immediate family member's property. We reject as untenable defendant's argument that Armando had no concern about whether his brother's savings

were pilfered from the apartment that he regularly visited. Armando's close familial relationship with the owner of the property, his regular presence at the apartment, and knowledge of where the property was hidden by Alex establish that Armando had constructive possession of the cash.

Defendant misplaces his reliance on our decision in *People v. Ugalino*, *supra*, 174 Cal.App.4th 1060. In *Ugalino*, Joshua Johnson and Jessie Rider shared a two-bedroom apartment with several other people. (*Id.* at p. 1062.) Defendant and his accomplice entered the apartment on pretense of buying marijuana from Johnson, a drug dealer. Once inside, defendant and his cohort drew guns on Johnson, and defendant announced, "You're getting jacked." (*Id.* at pp. 1062-1063.) Johnson stuffed the drugs that he had been holding into his pants and fled the apartment. The assailants followed Johnson in pursuit. (*Id.* at p. 1063.) On appeal, we reversed defendant's conviction for attempted robbery of Rider. (*Id.* at p. 1065.)

In reversing the conviction, we noted that "Rider did not have actual possession of the marijuana, and Johnson stored the marijuana in a locked safe in his bedroom." (*Ugalino, supra,* 174 Cal.App.4th at p. 1065.) Rider did not have access to the safe. "In fact, Rider did not even have a key to the apartment, coming and going only when someone else was home." (*Ibid.*) Moreover, "there was no evidence [Johnson] expected Rider to assist him" in protecting his belongings. (*Ibid.*) Lacking any connection to Johnson other than sharing an apartment, we held

that Rider could not be deemed to have constructive possession of the personal property locked away by Johnson. (*Ibid.*)

Although Armando did not live in Alex's apartment, he had a close connection to Alex. Not only was Armando his brother, but Armando was also sufficiently close to Alex that he knew where Alex kept his hidden savings. Armando had a special relationship with Alex that conferred him with constructive possession of Alex's personal property in the apartment.

The evidence sufficed to convict defendant of robbery against Armando because he was robbed of property over which he had constructive possession.

II

Sufficiency of the Evidence – Criminal Threat

During closing arguments, the prosecutor urged the jury to convict defendant on a single count of making a criminal threat based on either of defendant's two statements: (1) "Don't fight, . . . you're playing with a loaded gun," or (2) "I better not see this shit in the newspaper, don't call the police. We do this shit bare-faced. I'm [something unintelligible] bandit."

Defendant challenges the sufficiency of the evidence supporting the conviction, pointing out that none of the occupants of the apartment recalled defendant's "loaded gun" statement at trial. Under the same argument heading, defendant also contends that neither of his statements communicated an "unequivocal, unconditional, immediate and specific" threat nor

"a gravity of purpose and an immediate prospect of execution of the threat." We reject defendant's contentions.

A. Standard of Review

As noted in part IA., we review claims of insufficient evidence by considering the whole record in the light most favorable to the judgment to assess whether it contains solid and credible evidence allowing a reasonable trier of fact to find defendant guilty beyond a reasonable doubt. (*People v. Abilez* (2007) 41 Cal.4th 472, 504; *People v. Johnson* (2980) 26 Cal.3d 557, 578.)

In contrast to the deference we accord to factual findings made in the trial court, we exercise independent review on the question of whether facts meet the statutory definition of a criminal offense. (See *People v. Waidla* (2000) 22 Cal.4th 690, 730.) "The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review." (*People v. Ramos* (2004) 34 Cal.4th 494, 505.) We therefore independently review whether defendant's threats meet the statutory definition of section 422.

B. Sufficiency of the Evidence – *Loaded Gun Threat*

The record contains substantial evidence that defendant uttered the "loaded gun" threat. Officer Emiliano Rincon was dispatched to the apartment around 11:00 p.m. on January 19, 2007. As the investigating officer in the case, Officer Rincon wrote a report after speaking with individuals at the scene, including Alex and Savannah. In preparing his report, Officer

Rincon "essentially transcribe[d]" the notes he had made during his interviews.

Officer Rincon consulted his report in testifying that Alex had stated defendant threatened, "Don't fight, . . . you're playing with a loaded gun." The officer's testimony – based on his regularly prepared police report – constituted solid, credible evidence that defendant issued the threat. The testimony of a single witness suffices to support a factual finding unless the testimony is inherently improbable or physically impossible. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The victims' failure to recall, during the trial, defendant's statement about the loaded gun does not undermine the sufficiency of the evidence. (*Ibid.*)

Given the substantial evidence of defendant's statement "Don't fight, . . . you're playing with a loaded gun," we come to the question of whether the statement constitutes a criminal threat under section 422. In pertinent part, section 422 provides:

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the

threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. [¶] For the purposes of this section, 'immediate family' means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household."

Defendant argues that the "statement did not constitute a threat." We agree that defendant's statement does not necessarily constitute a threat if the words are viewed in isolation of the context in which they were spoken. Depending on the circumstances, "Don't fight, . . . you're playing with a loaded gun" might be meant to ensure the safety of a friend who plans to confront an armed adversary, be meant as hyperbole in discouraging complaints about an irascible social acquaintance, or as an actual threat of physical injury or death by use of a firearm with live ammunition.

Because words can have different meanings, can be employed literally or rhetorically, and convey varying emotions depending on intonation, we must look beyond the words themselves to evaluate the meaning of the statement for which a conviction of criminal threat was sought. In assessing "whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and

immediate prospect of execution of the threat" we consider the defendant's statement in light of "all the surrounding circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 (*Mendoza*).)

Here, the circumstances surrounding defendant's statement regarding his loaded gun compel us to conclude that he made an unequivocal, unconditional, and immediate threat within the meaning of section 422. Defendant spoke the words after he and two other men forced open the door to the apartment. The statement was made in response to an attempt by Alex to grab the gun. Defendant intended to convey an intent to use the gun to subdue any noncompliance with defendant's orders.

Defendant did not equivocate, hesitate, or express any reservations about using the loaded gun. Alex understood the gravity of the threat because he offered no further resistance. Armando agreed to show the assailants where a substantial amount of drugs and cash had been hidden in a back room. Armando sounded "panicked, sounded like he was gonna cry." Moreover, Armando avoided putting up a fight even after he was punched repeatedly. Savannah was so frightened that defendant repeatedly told her to calm down.

The audience for defendant's statement instantly and thoroughly understood the seriousness of his threat. Alex and Armando would not have allowed themselves to be bloodied and robbed if they had not taken defendant's statement about the loaded gun as an immediate and dangerous threat to shoot someone who failed to comply with the assailants' orders.

Defendant's statement about his loaded gun was not his only threat. As the prosecutor noted in his closing argument, defendant's final statement upon leaving the apartment reinforced the threatening nature of defendant's first statement. The prosecutor argued that "what [defendant] is intending to do with those particular words is to strike fear in the hearts of the victims. Not only is he coming to their house with a gun, not only has he told them that gun is loaded, but he is subsequently saying that I'll be watching." We may consider the threats together in assessing the circumstances surrounding their utterance. "[I]t is clear a jury can properly consider a later action taken by a defendant in evaluating whether the crime of making a terrorist threat has been committed. . . . [A]ll of the circumstances can and should be considered in determining whether a terrorist threat has been made." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014 (*Solis*).)

In *Solis*, the defendant left telephone messages threatening to kill his ex-girlfriend and everyone else in her apartment by setting it on fire. (*Solis*, *supra*, 90 Cal.App.4th at p. 1009.) Defendant's ex-girlfriend and her roommate became frightened upon hearing the messages. They left the apartment and found it ablaze when they returned an hour later. (*Ibid.*) On appeal, defendant challenged his convictions of section 422 by arguing that the court misinstructed the jury that it could consider the arson in deciding whether the earlier threat violated section 422. (*Id.* at p. 1013.) After surveying reported case law, the *Solis* court concluded that the arson was part of the surrounding

circumstances that the jury could consider in deciding on the criminal threat charges – even though the arson occurred an hour after the threats were made. (*Id.* at pp. 1013-1014.) Consistent with *Solis*, the prosecutor properly pointed out that defendant's subsequent "newspaper" threat confirmed the seriousness of the earlier "loaded gun" threat. Taken together, the jury had ample basis to conclude that the loaded gun threat met the requirements of section 422.

Defendant also contends that "[t]he statement added nothing more to the situation already in progress, that is, the burglary/robbery." Underlying defendant's contention is the notion that a defendant should not receive punishment for issuing a criminal threat if it enables a burglary or robbery for which he is also punished. However, defendant offers no recognized legal theory explaining why factually sufficient evidence of a criminal threat may not be recognized as a crime under section 422.

Rather than disallowing multiple convictions for a single course of conduct, the California Supreme Court has explained that "[t]he solution we have adopted is, in general, to permit multiple convictions on counts that arise from a single act or course of conduct - but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions." (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228- 1229.)

Granted, "[a] defendant may not be convicted of an offense that is included within another offense. (*People v. Reed* (2006)

38 Cal.4th 1224, 1227 (*Reed*).) [¶] '[I]f the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.' (*Reed, supra*, 38 Cal.4th at p. 1227.) The manner in which a crime has been pleaded is not relevant when assessing whether one offense is included within another offense; the pleadings are relevant when and only when the question is whether a defendant may be convicted of an uncharged crime. (*Id.* at pp. 1228-1231.)" (*People v. Milward* (2010) 182 Cal.App.4th 1477, 1480.)

A criminal threat under section 422 is not a lesser included offense of robbery. Communication of a threat to inflict bodily harm is not an element of robbery, which may be a theft accomplished by silent force. Purse-snatching, for example, constitutes robbery even if no words are spoken as force is applied. (See, e.g., *People v. Burns* (2009) 172 Cal.App.4th 1251, 1257.)

When a robbery *is* accomplished by means of conduct that is itself criminal – such as by assault with a deadly weapon – the defendant may be convicted on both counts. (See, e.g., *People v. Gilbert* (1963) 214 Cal.App.2d 566, 568 [defendant properly convicted of attempted robbery and assault with a deadly weapon, but sentence for assault stayed under section 654]; *People v. Wolcott* (1983) 34 Cal.3d 92, 98 [holding that assault with a deadly weapon is not a lesser included offense to robbery]; *People v. Vorbach* (1984) 151 Cal.App.3d 425, 430 [same].)

Even though a criminal threat may often be used to facilitate the commission of another offense, the threat may nonetheless serve as the basis for a separate conviction. For example, in *Mendoza, supra*, 59 Cal.App.4th 1333, the defendant's threatening of a witness served as a basis for separate convictions of issuing a criminal threat and attempt to dissuade a witness from testifying. (*Id.* at p. 1338.) Even though the criminal threat was "incidental" to the defendant's "primary objective of dissuading [the witness] from testifying at his brother's upcoming trial," multiple convictions were warranted. (*Id.* at pp. 1340, 1346.) Rather than reverse the conviction for making a criminal threat, the *Mendoza* court applied section 654 to stay the sentence for that offense. (*Id.* at p. 1346.) Consistent with *Mendoza*, we reject defendant's contention that the criminal threat's inherent aid to the commission of robbery and burglary warrants reversal of the conviction of section 422.

The proper remedy for multiple convictions arising out of a single course of conduct is to stay the additional sentences pursuant to section 654 rather than to reverse any of the convictions. "The purpose of section 654 is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Indeed, we consider defendant's arguments regarding section 654 in part V, *post*, to conclude that one of them has merit.

C. Sufficiency of the Evidence – *"Newspaper" Threat*

Defendant next argues that his second statement, "I better not see this shit in the newspaper, don't call the police. We do this shit bare-faced. I'm [something unintelligible] bandit," lacked the specificity and imminence requirement to be a threat, and did not cause any of the victims to experience reasonable fear. We disagree.

Defendant made his statement just before leaving the victims' apartment. The obvious import of the statement was to impress upon the victims the threat of future harm if the robbery was reported to the police or seen in the newspaper. The statement was made after the victims had been beaten, serving as a grim reminder that defendant and his compatriots were capable of returning and inflicting more harm. Defendant's words and the surrounding circumstances conveyed a gravity of purpose and immediate prospect of execution. (*Mendoza*, *supra*, 59 Cal.App.4th at pp. 1341-1342; *People v. Brooks* (1994) 26 Cal.App.4th 142, 144.)

Defendant's reliance on *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*) is misplaced. In that case, we held that a painting created as an art project that depicted a minor shooting an officer in the back of the head was insufficient to constitute a threat because the painting was a mere "pictorial ranting" that was ambiguous and the surrounding circumstances

did not establish a gravity of purpose or immediate prospect of execution. (*Id.* at pp. 863-865.)

Unlike the painting in *Ryan D.*, defendant's threat was immediate, unequivocal and unambiguous. Defendant's statements, when considered along with the surrounding circumstances, conveyed a clear intent to threaten the victims with physical harm in order to dissuade them from reporting the incident.

Defendant's assertion that his statements did not cause any of the victims to "experience[] any *sustained* fear—or any fear at all" finds no support in the record. Savannah testified that when defendant and his assailants left the apartment, "our nerves were high . . . . We were just kind of shaken and scared at the same time." Savannah added that they subsequently moved from the apartment because "we didn't feel safe in the neighborhood any longer." Alex testified that he was scared for Savannah and his son as a result of what happened. Armando also testified that he felt threatened by the statement. Thus, the record contains substantial evidence that defendant's statement caused the victims to be placed in sustained fear.

Finally, since defendant had his gun pointed at Alex's head throughout the ordeal, two of the victims were beaten, and defendant knew where the victims lived, their fears were obviously reasonable. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 754-755 [victim's fear held reasonable based on observing defendant assault others].)

III

Juror Unanimity Instruction

Defendant contends the trial court erred in failing to give a jury unanimity instruction with respect to the charge of making criminal threats. He reasons that the "court's failure to properly instruct on the issue of unanimity created the possibility of a conviction even though jurors did not agree about which statement constituted a violation of section 422." We agree that the trial court erred but find the error to be nonprejudicial.

A. The Threats

The prosecutor urged conviction of a single count of making a criminal threat based on defendant's statement about his loaded gun, and his subsequent threat about seeing the incident reported in the newspapers.

The prosecutor did not elect which threat should be relied upon by the jury to convict. Instead, the prosecutor argued that multiple victims and multiple threats provided ample basis for a single conviction of section 422. To this end, the prosecutor noted that any of the three adult occupants of the apartment qualified as a victim of the criminal threat: "Now, to prove that a defendant is guilty of this particular crime, the defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Alexander Navarette and/or Savannah Mowery and/or Armando Navarette. We essentially put that together as the complaining witnesses, but essentially you can look at that, that one or all three of them separate and

indivisible or possibly all together, is the way you can look at that particular charge. [¶] The defendant made the threat to the complaining witness, again either Savannah and/or Armando and/or Alexander Navarette."

The prosecutor also argued that the "loaded gun" and newspaper threats each sufficed for a conviction: "In this case we have two – actually we have a number of statements which were made to the complaining witnesses which evidence that. The first was at the door. Don't [fight], you're playing with a loaded gun. The last one was – I think it's the most striking of them – I better not see this in the newspaper. Don't call the police. I'm doing this – we do this shit barefaced."

B. Duty to Instruct

"[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When a defendant is charged with a single count of making a criminal threat, and the evidence shows more than one criminal threat was made, the prosecutor must either make a clear election of the threat for which a conviction is sought, or the trial court must give a jury unanimity instruction. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 (*Melhado*).)

In this case, the prosecutor's highlighting of three victims and two threats in arguing for a single conviction of section 422 required a juror unanimity instruction in the absence of any election by the prosecution. (*People v. Norman* (2007) 157 Cal.App.4th 460, 464.)

In sum, the evidence showed two threats sufficient to support a single criminal threat conviction. The "loaded gun" threat occurred when defendant initially burst into the apartment, and the "newspaper" threat was made almost 20 minutes after the assailants first arrived. Given this evidence, the jury should have received an instruction requiring them to find unanimously the act constituting the charged criminal threat.

The need for a unanimity instruction was not obviated, as the Attorney General contends, on the basis of the continuous course of conduct exception. "This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction . . . . [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]" (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882, quoting *People v. Thompson* (1984) 160 Cal.App.3d 220, 224.) Section 422 is not a statute that contemplates a continuous series of acts over an extended time. (*Id.* at p. 883.)

Moreover, the record in this case shows that the threats were not so closely connected as to constitute a continuous course of conduct. Contrary to respondent's assertion,

defendant's threats were not made "within moments of each other." Instead, the first and last threats were made nearly 20 minutes apart. During that time, the three men hunted the drugs and cash in the apartment, held Alex at gunpoint then beat him, and repeatedly punched Armando. The assailants even rummaged through cupboards, flipped the mattress, and riffled through drawers. The threats were separated by a substantial amount of time and activity by the assailants.

The separate times and purposes of the threats rendered the continuous course of conduct exception inapplicable so that the trial court had a sua sponte duty to instruct on juror unanimity. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Norman*, *supra*, 157 Cal.App.4th at p. 464.)

C. Prejudice

As we explained in *People v. Norman, supra,* 157 Cal.App.4th 460, 466, "the failure to give a unanimity instruction may be harmless error if we can conclude beyond a reasonable doubt that all jurors must have unanimously agreed on the act(s) constituting the offense. [Citations.]" (See also *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186-188; *Melhado, supra,* 60 Cal.App.4th at p. 1536; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) On this record, we are able to declare that the error was harmless beyond a reasonable doubt.

During closing argument, defense counsel presented a singular defense to all of the charges. Counsel argued that defendant was misidentified as being one of the assailants. To this end, the defense argued that none of the identifications of

defendant sufficed to prove his participation in the robbery beyond a reasonable doubt. As appellant's counsel conceded at oral argument in this court, defendant's trial counsel did not claim that any particular one of the criminal threats was factually unsupported. When a jury's verdict indicates that it disbelieved the only defense tendered, the failure to instruct on unanimity is harmless. (*People v. Wolfe, supra,* 114 Cal.App.4th 177, 188.) There is no reasonable possibility that jurors were split on the issue of defendant's issuance of a criminal threat.

The trial court erred by failing to give a unanimity instruction, but the error was harmless beyond a reasonable doubt.

IV

Subordinate Firearm Enhancement

At sentencing, the trial court designated the first robbery count (count 1) as the principal term, imposing the middle term of four years, and imposing a 10-year consecutive firearm enhancement to that count. The court also imposed a consecutive sentence of one-third of the midterm (16 months) on the second robbery count (count 2), followed by another consecutive 10-year firearm enhancement pursuant to section 12022.53, subdivision (b).

Defendant contends the trial court's imposition of a full, 10-year consecutive enhancement on the second robbery count violated section 1170.1, subdivision (a). The Attorney General

concedes the point. We agree. We decided this issue in *People v. Moody* (2002) 96 Cal.App.4th 987.

The court erred in imposing the full 10-year sentence enhancement as to the second robbery count. The proper sentence for the enhancement was *one-third* of the 10-year term, or three years and four months. (See *People v. Moody, supra,* 96 Cal.App.4th at p. 994.) The sentence must be modified to correct the error.

V

Section 654

Defendant claims that section 654 requires that the punishment for both the assault and burglary convictions must be stayed, since both crimes were incidental to the robbery. The first point lacks merit, but we agree with defendant on the second.

Although defense counsel did not raise the section 654 issue at sentencing, it is properly before us. (See *People v. Hester* (2000) 22 Cal.4th 290, 295 ["'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court'"].)

A. Assault Conviction

Defendant contends the "trial court erred by imposing a [concurrent] sentence on the assault count because section 654 required staying any sentence on [that] count."[3] He argues that

[3] In defendant's supplemental opening brief, he states that the trial court imposed a *consecutive* sentence on the assault count. However, the reporter's transcript and abstract of judgment both show that the court imposed a concurrent term.

"the assault was for the purpose of effecting the robbery, and nothing more."

Section 654 provides in relevant part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 189 (*Nguyen*).) However, if "'the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*Nguyen*, *supra*, at pp. 189-190.)

The defendant's intent and objective are factual questions for the trial court, and its ruling on these matters will be upheld if supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "We review the [trial] court's determination of [defendant's] `separate intents' for

[substantial] evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

In this case, *after* the robbery was complete, Alex was taken to the bedroom and assaulted by defendant. The assault on Alex was a separate act of violence and totally unnecessary to effectuate the robbery. Clearly, section 654's multiple punishment prohibition does not apply. "[A] separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*Nguyen*, *supra*, 204 Cal.App.3d at p. 193.)

B. Burglary Conviction

Defendant contends the trial court also erred in imposing a consecutive sentence on the burglary count in violation of section 654. He argues that since "both the robbery and the burglary shared a single objective," the punishment on the burglary count should be stayed. We agree.

"'The proscription against double punishment . . . is applicable where there is a course of conduct which violates more than one statute and comprises an indivisible transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but

not for more than one.'" (*People v. Miller* (1977) 18 Cal.3d 873, 885.) It is improper to sentence a defendant for burglary and an underlying felony offense where the felonious entry was for the purpose of accomplishing the underlying felony. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98; *People v. Radil* (1977) 76 Cal.App.3d 702, 713.)

This principle applies here. The underlying felony for the burglary conviction was the commission of the robbery. Both the burglary and the robbery were committed with the single goal of taking the victims' property. Under such circumstances, punishment for the burglary must be stayed. (See *People v. Le* (2006) 136 Cal.App.4th 925, 931-932 [section 654 required stay where burglary and robbery shared single objective].)

C. Remand

We turn to the proper remedy for the sentencing errors. The trial court committed two sentencing errors: (1) imposing the full 10-year firearm enhancement to count 2 (second robbery), and (2) failing to stay count 4 (burglary) pursuant to section 654. Ordinarily, we would simply modify the sentence and affirm the judgment as modified. (See, e.g., *People v. Umana* (2006) 138 Cal.App.4th 625, 643.) However, as we shall explain, had the trial court been aware of these sentencing errors, it may have affected its sentencing choice.

Initially, the trial judge sentenced defendant to an aggregate sentence of 28 years four months, running all terms consecutively. Defense counsel then requested the trial court run some of the terms concurrently. After hearing arguments

from both the defense and prosecution, the judge amended the sentence for the assault conviction to run *concurrently* with the other terms rather than consecutively, resulting in an aggregate sentence of 27 years four months.

As a result of the sentencing errors, we have noted defendant's aggregate sentence will be reduced by eight years – six years eight months for the firearm enhancement reduction and 16 months on account of the stayed burglary conviction. Given his initial inclination to run all of the terms consecutively and recited reasons in support of that choice, there is a reasonable probability that, had the trial judge known the sentence was going to be reduced by eight years, that fact would have affected his choice of sentence, at least with respect to the assault conviction. Since the trial court's sentencing decision was not informed by these errors, the matter must be remanded so that the court may exercise its discretion in an informed manner. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 ["'[T]he trial court is entitled to consider the entire sentencing scheme . . . [and] may reconsider all sentencing choices'"].)

DISPOSITION

Defendant's 10-year firearm enhancement on count 2 is corrected to reflect a term of three years four months. Count 4 is ordered stayed, such stay to become permanent upon completion of the sentence for robbery. The matter is remanded to the trial court for resentencing in light of the modifications set forth above. In all other respects, the judgment is affirmed.

Following resentencing, the court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SIMS, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.